Chai Hoon Seong v Wong Meng Heong

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1–11–230 2005
LAU BEE LAN J
29 SEPTEMBER 2009

Civil Procedure — Pleadings — Issue not pleaded — Defective pleadings — Whether evidence adduced at trial would overcome defects in pleadings

Civil Procedure — Trial — Order of speeches — Whether magistrate could depart from order of speeches — Whether speeches ought to be in written form — Subordinate Courts Rules 1980 O 28 r 16

Civil Procedure — Trial — Witness — Expert witness prohibited from attending court before giving evidence — Whether magistrate erred in ordering such prohibition

Evidence — Adverse inference — Failure to produce material evidence — Whether adverse inference ought to be drawn — Evidence Act 1950 s 114(g)

Evidence — Expert evidence — Qualifications of expert — Whether lack of qualifications of expert affected weight or admissibility of evidence

Evidence — Witness — Expert witness — Expert witness prohibited from attending court before giving evidence — Whether magistrate erred in ordering such prohibition

Professions — Medical practitioners — Negligence — Negligence of dentist — Standard of care required — Expert evidence, assessment of

Tort — Damages — Assessment — Magistrate awarded damages based merely on pleaded damages without undertaking assessment — Whether magistrate erred

Tort — Negligence — Causation — Burden of proof — Whether victim proved breach of duty by tort-feasor had caused victim reasonably foreseeable damage

A *Tort — Negligence — Standard of care — Negligence of dentist — Standard of care required — Expert evidence, assessment of*

The respondent brought a claim against the appellant dentist for negligence in respect of some dental work (crowning) carried out on her right molar ('the
B tooth'). At first instance, the claim was allowed. The appellant appealed to the High Court raising several grounds of appeal.

Held, allowing the appellant's appeal and dismissing the respondent's claim:

(1) In the instant case, although the respondent had not pleaded negligence
C in respect of some root canal work carried out on the tooth by a another dentist (Dr Chow), there was no prejudice and surprise caused to the appellant. The appellant's counsel had in cross-examination of the respondent posed several questions regarding the issue of the root canal treatment. The case was one where the evidence given at the trial would
D overcome the defects in the pleadings (see para 8). *Rosita bte Baharom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393 (SC) followed; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 referred.

(2) An adverse inference under s 114(g) of the Evidence Act 1950 ought to
E have been drawn against the respondent for failure: (i) to call several witnesses; and (ii) to produce a dental report given to the respondent. The witnesses were material witnesses and the report a material document (see paras 9–10). *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 referred.

F (3) The magistrate had erred in excluding the appellant's expert witness from court before the expert gave evidence (see para 13). *Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal* [2001] 2 MLJ 193 followed; *Tomlinson v Tomlinson* [1980] 1 WLR 322 referred; *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd* [1996] 2
G MLJ 334 referred.

(4) In the instant case, the magistrate had departed from the order of speeches under O 28 r 16(4) of the Subordinate Courts Rules 1980 ('SCR') and had given the appellant the additional opportunity of
H replying to the respondent's reply-to-submission. This she was entitled to do under O 28 r 16(1) of the SCR. Order 28 r 16(1) does not stipulate that the 'speeches' cannot be made in written form, which the magistrate so ordered in the instant case. The magistrate could not be said to have erred in not hearing oral arguments in the instant case (see
I para 19).

(5) There was merit in the appellant's contention that the magistrate had erred in applying the standard of care of a specialist in endodontics, instead of the standard of care expected of a dental practitioner in a private dental clinic when the appellant was a general practitioner and

the fitting of crowns came within the field of prosthodontics (see para 20). *Knight & Ors v Home Office & Anor* [1990] 3 All ER 237 referred; *Chien Tham Kong v Excellent Strategy Sdn Bhd & Ors* [2009] 7 MLJ 261 referred.

(6) In the instant case, the appellant was a general practitioner in the field of prosthodontics. The appellant's expert was a specialist and had been practising as a prosthodontist since 1984 with long experience in endodontics. The respondent's expert was an expert in endodontics. However, she had no private dental practice and only obtained her qualifications in 2000. Nevertheless, the lack of qualifications or experience of an expert affected the weight of the evidence rather than its admissibility (see paras 22 & 24–25). *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 followed.

(7) In the instant case, what was material was whether the magistrate had analysed and accorded the proper weight to the evidence of the experts. In this regard following the Roger's test, the magistrate had wrongly decided on the weight of evidence to be attached to the respondent's expert's evidence (Dr Roza). The magistrate failed to consider that Dr Roza had agreed to points in support of the appellant's defence and that she had agreed to material parts of the appellant's expert's evidence (see paras 26 & 28–29). *Chien Tham Kong v Excellent Strategy Sdn Bhd & Ors* [2009] 7 MLJ 261 followed; *Bolitho v City & Hackney Health Authority* [1997] 4 All ER 771 referred; *Lechemanavasagar a/l S Karuppiah v Dr Thomas Yau Pak Chenk & Anor* [2008] 1 MLJ 115 (referred); *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593 followed.

(8) With regard to causation, the respondent had failed to prove that the breach of duty by the appellant had caused reasonably foreseeable damage (see para 35). *Bolitho v City & Hackney Health Authority* [1997] 4 All ER 771 referred; *Lechemanasavagar a/l S Karuppiah v Dr Thomas Yau Pak Chenk & Anor* [2008] 1 MLJ 115 referred; *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593 referred.

(9) The magistrate had erred in failing to assess the damages after making a finding on liability. The magistrate had erred in awarding the damages as prayed for by the respondent, merely based on the pleadings after considering the facts of the case and the respondent's suffering (see paras 39–40).

[Bahasa Malaysia summary

Responden menuntut terhadap perayu atas kecuaian berikutan rawatan pergigian (korona) yang dilakukan ke atas gigi geraham kanannya ('gigi

A tersebut'). Pada mulanya, tuntutan tersebut dibenarkan. Perayu merayu ke Mahkamah Tinggi membangkitkan beberapa alasan rayuan.

Diputuskan, membenarkan rayuan dan menolak tuntutan responden:

B (1) Dalam kes ini, walaupun responden tidak memplid kecuaian dalam rawatan kanal akar yang dijalankan ke atas gigi tersebut oleh doktor gigi yang lain (Dr Chow), tiada prejudis dan kejutan yang diakibatkan kepada perayu. Peguam perayu dalam pemeriksaan balas responden mengutarakan beberapa soalan berkaitan isu rawatan kanal akar. Kes ini
C merupakan kes di mana keterangan yang diberikan semasa perbicaraan akan mengatasi kecacatan dalam pliding (lihat perenggan 8); *Rosita bte Baharom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393 (MA) diikut; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 dirujuk.

D (2) Suatu inferens yang menentang di bawah s 114(g) Akta Keterangan 1950 harus disimpulkan terhadap responden kerana kegagalannya: (i) memanggil beberapa saksi; dan (ii) untuk mengemukakan laporan pergigian yang telah diberikan kepada responden. Saksi-saksi merupakan saksi-saksi penting dan laporan tersebut merupakan laporan
E yang penting (lihat perenggan 9–10); *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 dirujuk.

(3) Majistret telah khilaf apabila mengeluarkan saksi pakar perayu dari mahkamah sebelum saksi tersebut memberi keterangannya (lihat
F perenggan 13); *Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal* [2001] 2 MLJ 193 diikut; *Tomlinson v Tomlinson* [1980] 1 WLR 322 dirujuk; *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd* [1996] 2 MLJ 334 dirujuk.

G (4) Dalam kes ini, majistret telah menyimpang daripada tatatertib ucapan-ucapan di bawah A 28 k 16(4) Kaedah-Kaedah Mahkamah Rendah 1980 ('KKMR') dan telah memberikan perayu peluang tambahan untuk membalas hujahan balas responden. Perkara ini boleh dilakukan oleh beliau di bawah A 28 k 16(1) KKMR. Akta 28 k 16(1)
H tidak memperuntukkan bahawa 'ucapan-ucapan' tersebut tidak boleh dibuat secara bertulis, yang mana majistret telah memerintahkan sedemikian dalam kes ini. Majistret tidak boleh dikatakan telah khilaf dengan tidak mendengar hujahan lisan dalam kes ini (lihat perenggan 19).

I (5) Terdapat merit dalam hujahan perayu bahawa majistret telah khilaf apabila menggunapakai standard berjaga-jaga seorang pakar endodontik, dan bukannya standard berjaga-jaga yang dijangkakan oleh pengamal doktor pergigian di klinik pergigian swasta kerana perayu merupakan pengamal am dan pemadanan korona adalah dalam bidang

prostodontik (lihat perenggan 20); *Knight v Home Office & Anor* [1990] 3 All ER 237 dirujuk; *Chien Tham Kong v Excellent Strategy Sdn Bhd & Ors* [2009] 7 MLJ 261 dirujuk.

(6) Dalam kes ini, perayu merupakan pengamal am dalam bidang prostodontik. Saksi pakar perayu merupakan seorang pakar dan telah beramal sebagai prostodoktik sejak tahun 1984 dan mempunyai pengalaman yang mendalam dalam endodontik. Saksi pakar responden merupakan seorang pakar dalam bidang endodontik. Tetapi, beliau tidak mengamal dalam bidang pergigian swasta dan hanya mendapat kelayakannya dalam tahun 2000. Namun, ketiadaan kelayakan dan pengalaman sebagai pakar memberi kesan kepada penilaian keterangan dan bukannya kepada kebolehterimaannya (lihat perenggan 22 & 24–25); *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 diikut.

(7) Dalam kes ini, apa yang penting ialah sama ada majistret telah menganalisa dan memberikan penilaian yang betul ke atas keterangan saksi-saksi pakar. Dalam hal ini, menurut ujuan Roger, majistret telah salah memutuskan penilaian keterangan saksi pakar responden (Dr Roza). Majistret telah gagal mempertimbangkan bahawa Dr Roza bersetuju menyokong pembelaan perayu dan bahawa beliau bersetuju dengan beberapa bahagian penting keterangan saksi pakar perayu (lihat perenggan 6 & 28–29); *Chien Tham Kong v Excellent Strategy Sdn Bhd & Ors* [2009] 7 MLJ 261 diikut; *Bolitho v City & Hackney Health Authority* [1997] 4 All ER 771 dirujuk; *Lechemanavasagar a/l S Karuppiah v Dr Thomas Yau Pak Chenk & Anor* [2008] 1 MLJ 115 dirujuk; *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593 diikut.

(8) Berkaitan penyebab, responden gagal membuktikan bahawa pelanggaran kewajipan oleh perayu telah menyebabkan kerosakan boleh ramal (lihat perenggan 35); *Bolitho v City & Hackney Health Authority* [1997] 4 All ER 771 dirujuk; *Lechemanavasagar a/l S Karuppiah v Dr Thomas Yau Pak Chenk & Anor* [2008] 1 MLJ 115 dirujuk; *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007]1 MLJ 593 dirujuk.

(9) Majistret telah khilaf apabila gagal menaksir kerugian tersebut setelah memutuskan liabiliti. Majistret telah khilaf dalam mengawardkan ganti rugi seperti yang dipohon oleh responden, hanya berdasarkan pliding setelah meneliti fakta-fakta kes dan penderitaan responden (lihat perenggan 39–40).]

Notes

For cases on assessment, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 159–159

For cases on causation, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 851–869

For cases on expert witness, see 7(1) *Mallal's Digest* (4th Ed 2010 Reissue) paras 2806–2810

For cases on failure to produce material evidence, see 7(1) *Mallal's Digest* (4th Ed 2010 Reissue) paras 242–246.

For cases on issue not pleaded, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5447–5451.

For cases on negligence of medical practitioners, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1613–1623

For cases on qualifications of expert evidence, see 7(1) *Mallal's Digest* (4th Ed 2010 Reissue) paras 1620–1627

For cases on standard of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1517–1519.

For cases on trial in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7812–7910.

For cases on witness, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7902–7910.

Cases referred to

Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority [1997] 4 All ER 771, HL (refd)

Chien Tham Kong v Excellent Strategy Sdn Bhd & Ors [2009] 7 MLJ 261, HC (folld)

Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal [2001] 2 MLJ 193, CA (folld)

Farrel v Secretary of State for Defence [1980] 1 All ER 166, HL (refd)

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593; [2007] 1 CLJ 229, FC (folld)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196, HC (refd)

Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (folld)

Knight & Ors v Home Office & Anor [1990] 3 All ER 237, QBD (refd)

Lechemanavasagar a/l S Karuppiah v Dr Thomas Yau Pak Chenk & Anor [2008] 1 MLJ 115, HC (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

Rogers v Whitaker (1992) 175 CLR 479, HC (folld)

Rosita bte Baharom (an infant) v Sabedin bin Salleh [1993] 1 MLJ 393, SC (folld)

Tomlinson v Tomlinson [1980] 1 WLR 322 (refd)

Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd [1996] 2 MLJ 334, HC (refd)

Legislation referred to

Evidence Act 1950 ss 45(1), 114(g)

Legal Aid Act 1971 s 21(3)(c)

Subordinate Courts Rules 1980 O 28 r 16(1), (3), (4)

PS Ranjan (Manmohan S Dhillion with him) (PS Ranjan & Co) for the appellant.
Azman Zakaria (Ahmad Daud & Associates) for the respondent.

Lau Bee Lan JC:

[1] This is an appeal against the decision of the learned magistrate given on 1 September 2005 wherein she had allowed with costs the claim of the respondent/plaintiff ('the respondent') brought against the appellant/defendant ('the appellant').

[2] The respondent, Wong Meng Heong's (f) claim against the appellant, Dr Chai Hoon Seong, a dentist was for damages for RM13,085.20 and costs purportedly caused by the negligence of the appellant. The respondent claimed on 21 October 1995 she visited the appellant's clinic to receive treatment and to crown her right molar. She alleged after receiving treatment she experienced pain and suffering due to the appellant's negligence, namely:

(a) the tooth has lost the power to hold food;

(b) losing the ability to chew food; and

(c) infection of the root of the tooth.

[3] The further and better particulars given by the respondent pursuant to a court order dated 15 March 2006 for further and better particulars (para 5 of the statement of claim) as to what action that were taken or not taken by the appellant which constituted negligence are (pp 30–31 of the AR):

(1) Failed and neglected to do a proper crowning on the Plaintiff's upper right molar.

(2) Failed and neglected in fitting the cones of the Plaintiff's root tooth as it was extended into the Plaintiff's tooth bone.

(3) Negligent in fitting the Plaintiff's cones' root tooth as one of it was too long and curled into the Plaintiff's tooth bone.

(4) Made a wrong decision and negligent in doing a deep scaling after the Plaintiff's complaint of pain which caused Plaintiff suffered more pain and trauma.

(5) Negligent in making a proper crown on the said teeth as it was higher from the rest of the tooth caused Plaintiff suffered pain and made her had no alternative but to consult the other dentist to cure it.

A **[4]** The defence raised by the appellant was before the crown was fitted on the upper right first molar of the respondent, the appellant had checked the colour of the crown, the fit of the crown margins, the proximal contacts with the adjacent teeth and the occlusal contacts with the opposing teeth; the respondent was given an opportunity to view the crown with a mirror before
B it was permanently cemented; that the said crown was not sitting on the root of the tooth and could not have extended into the bone of the tooth; the said crown had a good fit and that it was not possible for it to have curled into the bone of the tooth; the respondent was advised and agreed to undergo deep scaling under local anaesthesia so as to remove any plaque or tartar so
C that the gum would be free of bacterial infection; and that when the crown was fitted the occlusal contacts with the opposing teeth were carefully checked and the crown was cemented only when no high spot was evident.

D **[5]** The court has considered the written skeletal submissions of both learned counsel for the appellant (encls 34 and 28) and the respondent (encl 32) including the authorities and the appeal record ('AR'). The court's findings are as follows.

E GROUNDS NOS 1–5 — ISSUES NOT PLEADED

[6] Learned counsel for the appellant submitted that there was no pleaded allegations of negligence with regard to the root canal treatment undertaken by Dr Chow on tooth 16 on 28 October 1994 and 17 June 1996 and despite
F learned counsel for the respondent admitting that such an issue was not pleaded, his (counsel for appellant) objection on the same was overruled by the learned magistrate without any reason.

[7] I find it is not altogether accurate to say that the learned magistrate gave
G no reasons as in overruling the objection the learned magistrate gave reasons stating 'Bantahan ditolak. SP3 adalah saksi pakar dan defendan akan mempunyai peluang untuk memanggil saksi pakarnya. Asas keterangan tentang kecuaian tidak (sic) (I think it should read as 'telah') diplidkan dalam penyataan tuntutan' (p 158 of the AR).

H

[8] Be that as it may it is trite law that a party is bound by its pleadings as submitted by learned counsel for the appellant (see *Rosita bte Baharom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393 and *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196). The purpose of the 'pleading point' is 'to define the issues
I and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it'. (per LC Vohrah J (as he then was) in *Rosita bte Baharom (an infant)* at p 398 quoting Lord Edmund Davies in *Farrel v Secretary of State for Defence* [1980] 1 All ER 166 at p 173). In *Rosita bte Baharom (an infant)* the Supreme Court agreed with the trial

judge's conclusion that the late amendment by the plaintiff seeking to rely on contributory negligence after the parties had closed respective cases at the hearing caused the defendant to be taken by surprise and was prejudiced. However in this instant case I find notwithstanding the issue of overfilling of the root canal was not pleaded, there is no prejudice and surprise caused to the appellant as learned counsel for the appellant had in cross-examination of the respondent posed several questions regarding the issue of root canal treatment (pp 139–140, 148–149 of the AR). In fact this case falls squarely within the exception mentioned at p 396 of *Rosita bte Baharom (an infant)* where His Lordship held 'in appropriate circumstances, evidence given at a trial can overcome the defects in the pleadings of the plaintiff as long as the defendant from the very outset has not been misled, prejudiced, embarrassed or in any way taken by surprise or led astray by the plaintiff's pleading'.

GROUNDS NOS 6–9 — INADMISSIBLE EVIDENCE AND WITNESSES NOT CALLED

[9] Learned counsel for the appellant submitted that an adverse inference under s 114(g) of the Evidence Act 1950 ought to have been drawn against the respondent:

(a) in failing to call Dr Christopher Vincent as a witness and to produce the dental report which was given to the respondent;

(b) in failing to call Dr Chow as a witness as he had undertaken the root canal treatment on tooth 16, first on 28 October 1994, about one year before the crown was undertaken by the appellant, and the second on 17 June 1996 about eight months after the crown was undertaken and in the light of the respondent's complaints and the adverse findings on the root canal treatment; and

(c) in failing to call Dr Chuah Cheng Huat who also treated the respondent (besides Dr Nas (PW2)) at Cahaya Suria Clinic and when a question regarding hyponchondria had been raised at the said clinic.

[10] I find there is merit in what learned counsel for the appellant has submitted as I find all the aforesaid witnesses are material witnesses and the dental report of Dr Christopher Vincent to be a material document (*Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494).

GROUNDS NOS 10–15 — EXPERT IN COURT

[11] On this point the learned magistrate at p 214 of the AR stated 'Setelah mendengar hujahan-hujahan peguam plaintif dan peguam defendan dan

A autoriti-autoriti yang dikemukakan, mahkamah berpuas hati bahawa Dr Teo Choo Kum tidak dibenarkan berada di mahkamah semasa SD1 memberikan keterangan di mahkamah'.

B **[12]** Learned counsel for the appellant contended that the learned magistrate erred in excluding the appellant's expert, Dr Teo Choo Kum (DW3) whilst learned counsel for the respondent submitted the learned magistrate was correct as witnesses give evidence based on their personal knowledge and should not be allowed to remain in court before testifying to ensure that they would not be influenced by the testimony of other witnesses.

C

[13] I find there is merit in the contention of learned counsel for the appellant that the appellant's expert should not be excluded from the court before giving evidence. Suffice for me to rely on the Court of Appeal D authority of *Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal* [2001] 2 MLJ 193 where in both the appeals by Dr Soo and Assunta Hospital, one of the issues was whether it was proper for Dr Soo's expert to give evidence after reading the plaintiff's evidence and that of her expert during the trial. His Lordship Gopal Sri Ram at p 207C-D held 'From my own experience at E the Bar, it is a common occurrence for experts on one side to be present in court during the evidence of the other side. This is to enable the expert not only to advice counsel during cross-examination but also to be able to comment on the expert evidence of other side when he in turn gives evidence. It avoids surprise and delay. If, for any reason, an expert is unable to be F present when the other side is giving evidence, it is perfectly proper for him or her to later study the notes of the evidence to ascertain the nature of the evidence given'. Such an approach is also borne out by other authorities cited on the appellant's behalf like *The Supreme Court Practice 1997*, para 38/1/6 where it is stated 'The practice relating to the exclusion of witnesses from the G court does not apply and never has applied to the parties themselves or their solicitors or their expert witnesses. Those are never excluded from the court' quoting from *Tomlinson v Tomlinson* [1980] 1 WLR 322, also cited in *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd* [1996] H 2 MLJ 334 at p 348 where the court directed expert witnesses to be called by either side to the dispute may remain in court while other witnesses including witnesses of fact were testifying.

GROUNDS NOS 16–17 — ORAL ARGUMENTS

I

[14] Learned counsel for the appellant contended that the learned magistrate erred at the end of the trial in ordering written arguments and refusing to hear oral arguments and in disregarding O 28 r 16(4) of the Subordinate Courts Rules 1980 ('the SCR') which provides for the right to

make a closing speech. Learned counsel for the respondent submitted this ground of appeal is without merit as the appellant was still given the right to do the closing speech.

[15] Order 28 r 16(1) of the SCR provides:

> 16(1) The Judge before whom an action is heard may give directions as to the party to begin *and the order of speeches at the trial, and, subject to any such directions*, the party to begin and the order of speeches shall be that provided by this rule.

(Emphasis added.)

[16] Order 28 r 16(4) of the SCR provides:

> (4) If the defendant elects to adduce evidence, he may, after any evidence on behalf of the plaintiff has been given, open his case and, after the evidence on his behalf has been given, make a second speech closing his case, and at the close of the defendant's case the plaintiff may make a speech in reply.

[17] By virtue of O 28 r 16(1) of the SCR unless, inter alia, the trial judge give directions as to the order of speeches at the trial, the order of speeches shall be that provided in O 28 r 16(3) (in a situation where the defendant does not elect to give evidence — not applicable here) or under O 28 r 16(4) (in a situation where the defendant elects to give evidence as in this instant case). Under O 28 r 16(4) after the plaintiff has adduced evidence, the defendant may open his case and may make a second speech closing his case and the plaintiff may make a reply speech.

[18] In this instant case at p 263 of the AR after the respondent (defendant) closed its case the learned magistrate made the following directions:

> Hujahan Peguam Defendan — 7.7.2005
>
> Hujahan Peguam Plaintif — 4.8.2005
>
> Hujahan Peguam Plaintif (this should read as 'defendan' instead of 'plaintif' to be consistent with the 'Jawapan Penghujahan Defendan' (pp 109–133 of the AR) — 18.8.2005.

[19] The learned magistrate departed from the order of speech under O 28 r 16(4) of the SCR and gave the appellant the additional opportunity of replying to the respondent's reply submission (pp 75–108 of the AR) and this she is entitled to do under O 28 r 16(1) of the SCR. I find the provision does not stipulate that the 'speeches' cannot be made in written form which she has so ordered; hence I find the learned magistrate cannot be said to have

A erred in not hearing oral arguments.

GROUNDS NOS 18–22 — STANDARD OF CARE

B **[20]** Under this ground of appeal the appellant contended that the learned magistrate erred by applying the standard of care of a specialist in endodontics instead of the standard of care expected of a general dental practitioner in a private dental clinic when the appellant is a general practitioner and the fitting of the crown comes within the field of C prosthodontics. On the other hand it was submitted by the respondent there is no difference in the standard of care between the two aforesaid medical personnel as they are literally involved in the treatment of a patient. Further learned counsel for the respondent submitted the learned magistrate listened to the evidence of the experts called by the appellant and the respondent and D urged the court not to disturb her finding in accepting the evidence of Dr Roza (PW3) and cited the case of *Chien Tham Kong v Excellent Strategy Sdn Bhd & Ors* [2009] 7 MLJ 261 Held 3 at p 262 'In Malaysia, the *Rogers* test is applicable by virtue of *Foo Fio Na v Dr Soo Fook Mun & Anor*, which preferred the *Rogers* test to the *Bolam* test. The *Rogers* test dictates that the E court and not the medical profession must decide on the liability of doctors who are defendants in medical negligence actions. In so deciding, the court is at liberty to reject medical expert evidence which does not stand up to logical analysis. The court must instead scrutinise and evaluate the relevant evidence in order to adjudicate on the appropriate standard of care. Due F regard must be had to the relevancy of the opinion of experts in line with s 45(1) of the Evidence Act 1950'.

[21] I find there is merit in the argument ventilated on the appellant's G behalf. In *Knight & Ors v Home Office & Anor* [1990] 3 All ER 237 (cited by the appellant) the personal representatives of the deceased who committed suicide whilst he was put in a cell where prison officers observed him at not less than 15 minute intervals brought an action against the Home Office claiming that the standard of care provided for the deceased in the prison H hospital was inadequate. At p 237 the court held 'The standard of care provided for a mentally ill prisoner detained in a prison hospital was not required to be as high as the standard of care provided in a psychiatric hospital outside prison, since psychiatric and prison hospitals performed different functions and the duty of care in respect of each type of hospital had I to be tailored to the act and function to be performed. Accordingly, the facilities and numbers of staff for the provision of medical care for persons detained in prison did not have to be the same as for the specialist function of psychiatric hospitals of treating and if possible curing mental illness. It followed that there had been no negligence on the part of the prison service

in failing to provide in the hospital wing of the prison in which the deceased had been detained the patient/staff ratio which existed in psychiatric hospitals'.

[22] It is undisputed that the appellant is a general practitioner and the fitting of the crown comes under the field of prosthodontics. Dr Teo (DW3), the appellant's expert testified that he is a specialist and had been practising as a prosthodontist since 1984 with long experience in endodontics (commencing from being a member of Malaysian Endodontic Society (MES) since 1989 and being its President from 1994–1999 etc — see Dr Teo's curriculum vitae (exh D8) at pp 303–305 of the AR). Dr Teo supported the treatment and management provided by the appellant as is evident from his expert opinion (exh D5) at pp 293–297 of the AR. In any event even if the evidence of PW3, Dr Roza Anon bt Mohamed Ramlee, the respondent's expert witness is accepted, it will be seen that her evidence is supportive in material parts of appellant's evidence and the evidence of Dr Teo's (DW3) expert evidence to which I will address later when considering the issue of expert evidence.

[23] As for the case of *Chien Tham Kong* I will revert to this case later as it is also relied on by learned counsel for the appellant to show the approach the court ought to take with regard to expert evidence adduced in court and differences of opinions amongst experts.

GROUNDS NOS 23–35 — EXPERT EVIDENCE

[24] The learned magistrate addressed this issue on expert evidence at pp 11–12 of the AR. The appellant contended that Dr Roza (PW3) has no private dental practice and at the material time in 1995 and 1996 she had no qualifications in endodontics having obtained in her qualification the field of endodontics in the year 2000. The respondent argued that the fact that Dr Roza received her qualification only in 2000 did not disqualify her from giving evidence in 2004 and the learned magistrate did not err in relying on her statement as she was a specialist in the field of endodontics.

[25] In this regard I find the case of *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 cited by the respondent is relevant where the Supreme Court stated at p 229 'The lack of qualification or experience on the part of the expert must necessarily affect the weight of the evidence rather than admissibility'.

[26] I find what is material is whether the learned magistrate has analysed and accorded the proper weight to the evidence of the respective experts. In this regard learned counsel for the appellant submitted the court has to ensure

that the expert evidence is reasonable, respectable and responsible and stands up to a logical analysis with respect to the issue of standard of care which is expected of a doctor in the diagnosis, advice and treatment of a patient citing the cases of *Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority* [1997] 4 All ER 771, *Chien Tham Kong* and *Lechemanavasagar a/l S Karuppiah v Dr Thomas Yau Pak Chenk & Anor* [2008] 1 MLJ 115.

[27] In *Chien Tham Kong* I find that His Lordship Low Hop Bing J (now JCA) has painstakingly addressed the issue of both 'the Bolam test' and 'the Rogers test' which favoured the test in *Bolitho*'s case and applied by the Federal Court in *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2007] 1 CLJ 229 and after an analysis of the relevant authorities therein (including *Lechemanavasagar* which followed 'the Rogers test', concluded that '(He) would apply the *Rogers* test which has been accepted by the Federal Court in *Foo Fio Na* as it is binding on me. This test dictates that the court and not the medical profession must decide on the liability of doctors who are defendants in medical negligence actions. In so deciding, our courts are at liberty to reject medical expert evidence which does not really stand up to logical analysis, but instead must scrutinise and evaluate the relevant evidence in order to adjudicate on the appropriate standard of care. Due regard must be had to the relevancy of the opinion of experts in line with s 45(1) of the Evidence Act 1950, which provides that when the court has to form an opinion upon a point of eg science, the opinions upon that point of persons specially skilled in that science are relevant facts'.

[28] Following the *Rogers* test, I find the learned magistrate has wrongly decided on the weight of evidence that Dr Roza's evidence was unchallenged. I agree with the appellant's submission that the learned magistrate has failed to consider that Dr Roza had agreed to points which were in support of the appellant's defence as per the evidence which has been carefully identified by learned counsel for the appellant at *para 54* (pp 12–54) of the appellant's skeletal submission dated 13 April 2009 (encl 28) (except for para 54.10 where Dr Roza's answer as to whether the complaints of food trapping was for only of one day duration was in my view ambivalent as in 'May be or may be not' for 27 February 1996 and 'Yes, may be' for 28 February 1996).

[29] I also agree with the appellant's submission that the learned magistrate has failed to consider that Dr Roza had agreed to material parts of Dr Teo's evidence as per the evidence quoted at *para 55* including that at *para 54* of appellant's skeletal submission dated 13 April 2009 (encl 28).

[30] In *para 56* (pp 17–18) of appellant's skeletal submission dated 13 April 2009 (encl 28) learned counsel for the appellant has quoted relevant

parts of the appellant's evidence with regard to fitting the crown without root canal treatment; the high spots the posts and the scaling. As pointed out by the appellant in para 57 (p 18) of appellant's skeletal submission dated 13 April 2009 (encl 28), the use of posts was supported by Dr Roza, Dr Teo and the dental literature entitled 'Clinical Techniques in Dentistry: Planning and Making Crowns and Bridges, Bernard GN Smith, (3rd Ed) 1998'.

[31] Further learned counsel for the appellant also quoted the relevant parts of Dr Teo's evidence with regard to fitting the crown without root canal treatment and the high spots at para 58 (p 19) of the appellant's skeletal submission dated 13 April 2009 (encl 28).

[32] As submitted on the appellant's behalf, I agree the learned magistrate has not made any adverse findings against the appellant with respect to the posts, the scaling and the polishing. Furthermore as submitted I agree that the learned magistrate has failed to consider the evidence that four months (28 February 1996) and six months (24 May 1996) after the crown was fitted (28 October 1995), a dentist at Cahaya Suria Clinic (government clinic) had noted that 'Crown is firm and fits well' and these findings were made before the second root canal treatment was undertaken by Dr Chow on 17 June 1996.

GROUNDS NOS 39–42 — CAUSATION

[33] The learned magistrate's ground of decision on this point is under the heading 'chain of causation' at pp 13–14 of the AR.

[34] The appellant contended that the respondent had failed to prove causation. Learned counsel for the respondent submitted that the causation started when the respondent felt the pain after the crown was fitted and this was only relieved after the tooth 16 was extracted about seven months later.

[35] I find that the respondent has failed to prove that the breach of duty by the appellant (which I find has not been proven) has caused reasonably foreseeable damage to her as required in *Bolitho*, *Foo Fio Na* and *Lechemanavasagar* to name a few. This is especially so in light of Dr Nas's (PW2) findings for four months (28 February 1996 at p 271 of the AR) and six months (24 May 1996 at p 270 of the AR) after the crown was fitted it showed that the crown was not the cause of the respondent's complaints. In fact Dr Nas on 28 February 1996 after noting that 'Crown is firm and fits well. Gingival healthy.' also noted 'Pt unnecessarily worried (hypochondriac?). Explained for 20 min that there's nothing wrong. Returned after five min again requesting for XR ... Advised that it being a metal crown XR will not reveal any useful information'. The evidence showed

A the overfilling of the roots, the periapical lesion and the broken file (dental instrument) which caused the respondent to complain were connected to the root canal treatment undertaken by Dr Chow.

B **[36]** The court also observes that on 10 July 1996 the Cahaya Suria Clinic notes showed the respondent 'decided to file a suit against the private dentist who did her RCT' and as submitted 'RCT' means 'root canal treatment' and the private dentist is Dr Chow. According to these notes it showed the respondent was aware of 'Perforation of a root — filling material?/dental instrument (as claimed by the pt) to the pericipical tissues.' and the incident C regarding the perforation took place in Dr Chow's clinic on 17 June 1996 about eight months after the crown was fitted by the appellant.

[37] It is also significant to note that on 14 July 1996 the respondent testified (p 138 of the AR):

D

> I visited Hospital Kuala Lumpur on 14.10.1996. Dr Christopher attended to me.
>
> The crown tooth was extracted.
>
> Dr Christopher extracted the tooth.

E

> On 29.10.1996, I went to see Dr Christopher again to receive the last treatment.
>
> After the crown tooth extracted on 14.10.1996, I felt something was not right.
>
> Therefore, on 29.10.1996, I went to see Dr Christopher again and he removed something.

F

[38] Based on the respondent's own evidence it would appear the removal of the tooth with the crown did not solve her problem as she said 'After the crown tooth was extracted on 14 October 1996, I felt something was not G right.' and she had to see Dr Vincent 15 days later and he 'removed something'.

GROUNDS NOS 44–47 — NO ASSESSMENT OF DAMAGES

H **[39]** The respondent submitted that the learned magistrate had given the damages as prayed based on the pleadings after considering the facts of the case and the suffering of the respondent.

[40] I agree with learned counsel for the appellant that the learned I magistrate has erred in failing to assess the damages after finding liability.

[41] For completeness, I do not find it necessary to consider the ground of appeal on delay in completing the trial, in pronouncing judgment and in giving the grounds of decision. In my view it is sufficient based on the

aforesaid reasons to find that the learned magistrate has misconducted the trial justifying an order for a retrial as submitted by learned counsel for the appellant. Be that as it may, in the light of the unchallenged evidence, the non-joinder of Dr Chow, the respondent's failure to call the relevant witnesses, I agree with learned counsel for the appellant that the appropriate order is to allow the appeal and dismiss the claim and accordingly I order that the appeal be allowed and the decision of the learned magistrate given on 1 September 2005 be set aside and the respondent's claim is hereby dismissed. Pursuant to s 21(3)(c) of the Legal Aid Act 1971 no order as to costs is made against the respondent as she has a legal aid certificate.

Appellant's appeal allowed and respondent's claim dismissed.

Reported by Andrew Christopher Simon